

ORIGINAL  
RECEIVED

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

MAY 12 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of  
MARTHA J. HUBER, et al.

For Construction Permit for a  
New FM Station on Channel 234A  
in New Albany, Indiana

MM Docket No. 93-51

File Nos. BPH-911114ME,  
et al.

TO: Honorable Richard L. Sippel  
Administrative Law Judge

REPLY TO OPPOSITION TO PETITION  
TO ENLARGE

Martha J. Huber (Huber), by her attorneys, now replies to the "Opposition to Petition To Enlarge" filed by Midamerica Electronics Service, Inc. (Midamerica) on May 3, 1993.

In her April 14, 1993 "Petition to Enlarge Issues", Huber demonstrated that Midamerica's estimate that only \$85,000 would be needed to construct its station and to operate the station for three months without revenue was unreasonable on its face. Huber demonstrated that pursuant to Columbus Broadcasting Corporation, 3 FCC Rcd 5480 (Chief, Audio Services Division 1988), the cost estimate was inherently unreasonable because it was much lower than (1) the cost estimates of the other applicants and (2) estimates that were found prima facie unreasonable in Columbus. Midamerica's opposition misstates the law and utterly fails to provide information the Presiding Judge needed to determine the basis for Midamerica's estimate. The requested issues must

No. of Copies rec'd  
List ABCDE

therefore be added.

Huber cited Columbus Broadcasting Corporation as the controlling authority in her petition. Midamerica attempts to distinguish that case on the ground that the staff implicitly reviewed and accepted Midamerica's cost estimates by failing to specify issues against Midamerica. Midamerica Opposition, pp. 4-5 Midamerica's argument must be rejected because it

Presiding Judge must consider whether these estimates are unreasonable. Since Midamerica has not offered one valid distinction between Columbus and this case, hearing issues must be specified.

Midamerica also argues that Huber's petition is per se defective because it is not supported by affidavits. Midamerica Opposition, Pp. 2-3. The cases Midamerica cites show otherwise. In California Stereo, Inc., 39 FCC 2d 401, 402, 26 RR 2d 887, 890 (Rev. Bd. 1973), the Board wrote that it "will not add a cost estimates issue unless the applicant's estimates are unreasonable on their face, or challenged by specific facts based on affidavits from persons with personal knowledge of the facts." (Emphasis added, footnote deleted).<sup>1</sup> Huber showed in her petition, based upon the estimates of the other applicants and the Columbus case, that the Midamerica estimates were unreasonable on their face. Since the applications could be officially noticed, no affidavits were required.

On Page 3 of its opposition, Midamerica argues that its cost estimates are reasonable. It refuses, however, to provide the information on which such a determination could be based. Most significantly, Midamerica refused to provide its budget or any information about the amount of money it

---

<sup>1</sup> One of the cases cited in support of this proposition in a footnote was Viking Television, Inc., 17 FCC 2d 823, 16 RR 2d 123 (1969), the other case cited by Midamerica.

budgeted for any specific item. Midamerica has declined to provide any financial information. By refusing to provide any meaningful information on its financial proposal, Midamerica has left the Presiding Judge to guess how it proposes to make do with \$85,000. It has clearly failed to rebut Huber's prima facie case that its estimates were inherently unreasonable.

The only competent factual allegation Midamerica makes concerning its plans is that it has a used transmitter and tower ready for installation. Declaration of Peter Boyce, P. 1.<sup>2</sup> That statement says nothing about the availability of studio equipment, an antenna, program origination equipment, or all of the other equipment needed by a radio station. Boyce's declaration also says nothing meaningful about the staff that will be used to operate the station, how the station will be programmed, or anything else about the costs of operating the station. Although Midamerica had every incentive to explain and to justify its cost estimates, it refused to do so. A hearing must be held before findings can be made concerning Midamerica's budget.

Even the alleged availability of a used transmitter and tower raises a series of questions which Midamerica has refused to answer. Will that equipment still be available and

---

<sup>2</sup> Counsel makes other allegations about the use of existing offices and other equipment. Those allegations are not supported by Mr. Boyce's declaration or by anything which may be officially noticed, so they may not be considered. Section 1.229(d) of the rules.

in useable condition if this proceeding lasts several years? What modifications have to be made to the transmitter or tower to make them conform to the proposal made in Midamerica's application? Did Midamerica determine how much such modifications will cost? These are all substantial and material questions of fact which must be answered in a hearing. 47 U.S.C. §309(d)(2). In United Broadcasting Co. (KBAY-FM), 93 FCC 2d 482, 53 RR 2d 57, 77-81 (1983), an applicant was disqualified for proposing unrealistically low cost estimates and for making vague proposals to rely upon used equipment. Midamerica's financial proposal suffers from many of the same defects. When these problems are considered in light of Columbus Broadcasting Corporation, a hearing must be held.

Finally, Boyce's declaration references his broadcast experience and Midamerica's work in maintaining and installing equipment at broadcast stations. If anything, however, that experience only supports Huber's request for a false certification issue. The Midamerica cost estimates are clearly unreasonable on their face. Midamerica had every opportunity to demonstrate how Boyce used his experience to determine that the station could be constructed and operated for \$85,000. Instead, Midamerica refused to provide any meaningful information or explanation, and its opposition misstates the law. It can be inferred from Boyce's experience and Midamerica's refusal to provide or to explain its budget

that Boyce knew the estimates were unreasonable. The Presiding Judge must therefore add the financial qualifications and false financial certification issues requested by Huber.

Accordingly, Huber asks the Presiding Judge to grant her "Petition to Enlarge Issues".

Respectfully submitted,

MARTHA J. HUBER

By Morton L. Berfield  
Morton L. Berfield

By John J. Schauble  
John J. Schauble

Cohen and Berfield, P.C.  
1129 20th Street, N.W, # 507  
Washington, D.C. 20036  
(202) 466-8565

Her Attorneys

DATE: May 12, 1993

CERTIFICATE OF SERVICE


I, Linda Gibson, do hereby certify that on the 12th day of May 1993, a copy of the foregoing "Reply To Opposition To Petition To Enlarge" was sent first-class mail, postage prepaid to the following:

James Shook, Esq.\*  
Hearing Branch  
Federal Communications Commission  
2025 M Street, NW, Room 7212  
Washington, DC 20554

John Wells King, Esq.  
Haley, Bader & Potts  
4350 N. Fairfax Drive, #900  
Arlington, VA 22203-1633  
Counsel for Rita Reyna Brent

Bradford D. Carey, Esq.  
Hardy & Carey  
111 Veterans Memorial Blvd., #255  
Metairie, LA 70005  
Counsel for Midamerica Electronics Service, Inc.

Donald J. Evans, Esq.  
McFadden Evans & Sill  
1627 Eye Street, NW, Suite 810  
Washington, DC 20006  
Counsel for Staton Communications, Inc.

  
Linda Gibson

\* Hand Delivered